NTSB Order No.
EM-56

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 25th day of January 1977.

OWEN W. SILER, Commandant, United States Coast Guard,

v.

CHARLES W. CHAPMAN, Appellant.

Docket ME-50

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming a probationary suspension of his merchant marine officer's license (No. 393933).[1] The Commandant also sustained findings that appellant was negligent while serving as operator aboard the M/V ELLENA HICKS, a towing vessel underway in the Lowe. Mississippi River.[2]

Appellant appealed to the commandant (Appeal No. 2029) from the initial decision of Administrative Law Judge Herman N. Rabson, rendered after a full evidentiary hearing.[3] Throughout these proceedings, appellant has been represented by counsel.

The law judge found that, on December 30, 1973, appellant had operated and navigated the towing vessel, with the barge THELMA

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[1]The Commandant acted pursuant to 46 U.S.C. 239(g). An appeal to this Board therefrom is authorized by 49 U.S.C. 1903(a)(9)(B).

[2]Appellant s license qualifies him, inter alia, as an operator under the Towing Vessel Operators Licensing Act., enacted July 7, 1972. 46 U.S.C. 405(b). The Act provides that towing vessels "shall, while underway, be under the actual direction and control of a person licensed" by the Coast Guard. These licensing requirements are set forth in 46 CFR 10. See 38 Fed. Reg. 5746, March 2, 1973.

[3]Copies of the decisions of the Commandant and the law judge are attached.

COLLINS secured forward of the vessel's bow, on an inbound course through the Southwest Pass, in the Lower Mississippi River, that a condition of low visibility due to fog. ranging from zero to 600 feet, was encountered shortly after entering the Pass at 1435 hours (local time); and that this fog condition continued during the entire transit of the Pass by appellant's vessel and tow until reaching Mile Point 5 thereof at 1717 hours, where a collision occurred between the barge and the M/V NISSAN MARU, a Japanese cargo vessel proceeding in the opposite direction. The law judge further found that appellant did not post a bow lookout on the barge or used his fog whistle signals at any time during the transit; that such lookout "could have reasonably given [him] sufficient time to maneuver so as to avoid the collision..."; and that fog signals should have been used according to Article 15(c) of the Navigation Rules for Inland Waters.[4] He concluded that appellant was negligent, as charged, in failing to post "a proper lookout" or sound prescribed fog signals; and that these failures had "contributed to the collision with the NISSAN MARU." The law judge thereupon ordered a 3-month suspension of appellant's license of 6 months' probation.[5] The Commandant's decision repeats, in essence, the findings and conclusions of the law judge.

Appellant has a filed a brief on appeal, contending that his constitutional right against self-incrimination was violated by a Coast Guard officer who investigated the casualty; and that the charge of negligence was not substantiated. He therefore seeks reversal of the prior decisions. Counsel for the Commandant has filed a reply brief opposing these grounds for relief.

Upon consideration of the parties briefs and the entire record, the Board concludes that the findings of the law judge are supported by reliable, probative, and substantial evidence. We adopt the law judge's findings as our own, except as modified herein. Moreover, we agree that the sanction is warranted.

Appellant's first contention is that the privilege against compulsory self-incrimination applies to a Coast Guard form (CG2692-Report of Vessel Casualty of Accident) which he filled out at the accident site. He testified that the investigating officer "definitely told me that if he didn't get [it] the barge would not

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[4]I.D.,23.

[5]The condition of probation was that no charge of negligence, incompetence or misconduct under 46 U.S.C. 239( ) should be proved against appellant for acts committed within the probationar period. The law judge appears to have ordered such probation as a form of leniency in view of appellant's good prior record.

be moved" (Tr. 253). Apart from this element of duress however, appellant must show that the compelled disclosures confronted him with "substantial hazards of self-incrimination."[6] The accident report which appellant filled out was not offered in evidence. His showing is confined to an argument that the Coast Guard "could have attempted to utilize the information... to provide the undergirding to a charge of criminal negligence."

The report is not directed at a "selective group inherently suspect of criminal activities."[7] It is required by law whenever a vessel of the United states sustains or causes an accident "involving the loss of life, the material loss of property, or any serious injury to any person, or has received any material damages affecting her seaworthiness or her efficiency...."[8] Such accidents commonly occur without creating criminal liability and appellant acknowledges that a criminal charge would be unsupportable on the basis of the hearing record. The privilege cannot be used to shield one who is "guilty of negligence as a matter of tort law."[9]

Appellant cites various judicial decisions wherein the privilege has been recognized in civil and administrative proceedings. In those instances, the privilege was upheld where answers under oath might tend to "support a conviction under a criminal statute...[or] furnish a link in the chain of evidence necessary to prosecute one under a criminal statute;"[10] where the penalty for not giving sworn answers to an administrative complaint was suspension or revocation of a license; [11] and where the statutory report (of oil spills) was used to recover a penal fine.[12] These cases are inapposite, since appellant has not actually invoked the privilege in this proceeding. Nor has he pointed to

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[6]Marchetti v. United States, 390 U.S. 39. 61 (1968); California v. Byers, 402 U.S. 424 (1971).

[7]Albertson v. SACB, 382 U.S. 70 79 (1965).

[8]33 U.S.C. 361.

[9]California v. Byers, supra, at 431.

[10]Gulf Oil Corporation v. Tung Kate Malloy, 291 F. Supp. 816, 818 (E.D. La. 1968).

[11]Kozerowitz v. Florida Real Estate Commission, 289 So. 2d 391 (Fla. 1974)

[12]United States v. LeBeouf Bros. Towing Co., Inc., 377 F. Supp. 558 (E.D. La. 1974).

any matter required to be disclosed or which he did disclose on the accident report which would have entitled him to do so. He thus relies solely on the fact that he was not given warning of the right to counsel and to remain silent by the Coast Guard investigating officer prior to filling out the report. Where the privilege itself is not applicable, we have no reason to require the warnings. Since appellant has not made the requisite showing for application of the privilege against self-incrimination, his first contention is rejected.

In his second contention, appellant argues that the findings of negligence are contrary to judicial precedent and customary practices of towboat operators on the Mississippi River. He also argues that the Commandant erred in refusing to apply Article 27 of the Inland Rules, known as the "special circumstance rule."

The maintenance of "a proper lookout" is provided for in Article 29 of the Inland Rules.[13] This is one of the strictest requirements in the law of admiralty, particularly in restricted visibility conditions.[14] A lookout should be stationed as far forward as possible, which is ordinarily the best position for "observing sounds, light, echoes and obstructions to navigation."[15] However, no lookout was posted on the barge, which was the lead vessel in this case. Instead, appellant was serving as the sole lookout from his position in the upper pilot house of the tow.

The thrust of appellant's argument is that he had greater visibility due to the elevation of the bridge and therefore was not required to post an independent lookout. In Chotin Transportation, Inc. v. M/V Hugh C. Blaske, upon which appellant relies, it was held that the pilot house was "...the best position from which to see and act as a lookout on a large river tow" in circumstances where the visibility "was good and from the pilothouses of the towboats other tows could be observed several miles away."[16] In the case before us, it is undisputed that visibility was severely

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[13]33 U.S.C. 221.

[14]Clary Towing Co., Inc. v. Port Arthur Towing Co., 367 F. Supp. 6 (E.D. Tex. 1973), Griffin on Collision, § 102.

[15]Sun Oil Co. v. S.S. Georgel, 245 F. Supp 537 (S.D. N.Y. 1965), aff'd per curiam 369 F. 2d 406 (2d Cir. 1966).

[16]356 F. Supp. 388, 391, 393 (E.D. La. 1972), aff'd per curiam 475 F. 2d 1370 (5th Cir. 1973). Union Reliance-Berean, 1966 AMC 1653, also relied on by appellant, similarly involved conditions of good visibility.

restricted throughout appellant's transit of Southwest Pass. During this entire time, appellant was responsible for handling the additional duties of navigation, radar observation, and radio communications (Tr. 316). It is undoubtedly true that he was giving some measure of attention to the lookout function. However, the requirement is for a lookout to devote his undivided attention to that function. As in Oil Transport Corp. v. Diesel Tanker F.A. Verdon, Inc., we hold that: "A lookout should have no other duties...' It is not safe to depend on the pilot or others on the bridge, who are charged with various important duties and responsibilities.'''[17]

There was expert testimony that the best location to act as lookout on appellant's vessel was from the upper pilot house and that tow operators customarily performed the lookout function as an added responsibility (Tr. 216-7). However, this expert was asked to assume special weather conditions, including surface fog, which would obviously not restrict visibility from the bridge (Tr. 216). We do not find that the hypothetical questions posed to the expert comported with the factual evidence.

Appellant concedes that he did not sound fog signals as required by Articles 15 of the Inland Rules when proceeding in fog.[18] He argues that the pilot of the NISSAN MARU was already aware of his approach, since the pilot testified that appellant's vessel was observed on radar before the collision. In our view, compliance with the rule cannot depend on postaccident knowledge. Appellant testified that he was not in communication with the NISSAN MARU. He cannot, therefore, rely on that vessel's awareness of his approach through its use of radar.

Appellant's expert also testified to the custom in river navigation of substituting established radio communication for fog signals during limited visibility. This has little relevance herein since the vessels were not in radio contact. Moreover, appellant's argument is undermined by the expert's testimony that if, as here,[19] he saw an unidentified "blip" on his radarscope, he would "regularly sound fog signals" (Tr. 224). Appellant's further argument that fog signals would have "blotted out" radio calls is utterly without merit as an excuse for not sounding them at any

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[17]192 F. Supp. 245, 247 (S.D. N.Y. 1960).

[18]33 U.S.C. 191.

[19]Appellant observed the NISSAN MARU on radar several minutes prior to the collision but did not succeed in contacting that vessel.

time.

The special circumstance rule[20] becomes operative only when a sudden or unexpected danger arises necessitating; deviation from the other navigational rules. Appellant argues that this rule permitted him to proceed to a safe anchorage. This decisions is not in issue. The issue is whether he could proceed in violation of Articles 29 and 15. He has shown no special circumstance which would exonerate his departure from these rules.

Based on our review of the record, appellant's observance of the rules in question would have afforded both vessels more time in which to avoid the collision. We find, therefore, that appellant's negligence contributed to the collision.[21]

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The orders of the Commandant and law judge suspending appellant's license be and they hereby are affirmed.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

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[20]33 U.S.C. 212.

[21]Appellant's further argument the the NISSAN MARU was solely responsible for the collision is not supported in the record. Neither do we find that appellant's negligence was the sole contributing factor.